Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCVC-803–04 OF 2018
FAIZAH JAMALUDIN JC
20 DECEMBER 2018

Land Law — Strata title — Management corporation — Claim over arrears of charges — Whether applicant remained in arrears of charges — Whether applicant denied of voting rights — Whether declaratory relief should be granted — Whether applicant had reasonable cause of action — Whether originating summons filed prematurely — Strata Management Act 2013 ss 60(3) & 61(3)

The applicant applied by way of an ex parte originating summons ('the OS') ('encl 1') and the defendant applied to strike out the applicant's OS ('encl 9'). The applicant prayed for, inter alia, an order that any annual general meeting ('AGM') held without the participation of the applicant shall be null and void, of no effect, and/or set aside. The applicant was the registered owner of seven retail parcels in the building known as Plaza 393 Complex ('Plaza 393'). The defendant was the management corporation ('the MC') of Plaza 393 under the Strata Titles Act 1985. The defendant commenced an action against the applicant at the Kuala Lumpur High Court in 2016 for arrears of service charges, sinking fund, quit rent and insurance charges for the period from 21 April 2008–4 March 2016. After full trial, the High Court allowed the defendant's claim in the sum of RM10,420,461.50 ('the judgment sum') with interests and costs ('the 2016 judgment'). The applicant appealed to the Court of Appeal and on 21 March 2018 the Court of Appeal allowed the appeal and set aside the 2016 judgment. On 10 April 2018, the applicant received the April 2018 accounts dated 5 April 2018 ('the April 2018 statement') from the defendant showing that the applicant was indebted to the defendant in the sum of RM11,930,047.15 ('the April 2018 charges'). The April 2018 statement contained the charges from 21 April 2008–4 March 2016, which the applicant claimed was illegal and which the defendant was not entitled to charge in view of the Court of Appeal's decision. On 13 April 2018, the applicant was notified by the Dewan Bandaraya Kuala Lumpur that the defendant planned to hold an AGM on 6 May 2018. On 17 April 2018, the applicant instructed its solicitors to dispute the April 2018 charges and demanded that the defendant to provide written confirmation that the applicant was entitled to vote at the AGM. The defendant's solicitors in its reply dated 20 April 2018 to the applicant's solicitors refused to provide the written confirmation requested and stated that under para 14 of the Second Schedule of the Strata Management Act 2013 ('the SMA'), the defendant was only obliged to put up the names of persons entitled to vote at an AGM on the notice board at least 48 hours prior to the AGM. The

sixth AGM was held and the applicant was not allowed to vote at the AGM. A

Held:

(1) As the maintenance charges were not imposed in a manner that was mandated by s 60(3) of the SMA, there were no charges imposed pursuant to s 60(3) of the SMA in respect of the applicant's parcels. It followed that the contributions to the sinking fund was also not in accordance with s 61(3). There was no basis for the defendant to include the judgment sum in the April 2018 statement and, based on this, to show in the statement that the applicant had outstanding charges, which were due and payable to the defendant. The defendant could not include charges, which were not mandated by statute and which the Court of Appeal had held to be illegal, in the April 2018 statement (see paras 49–50 & 52). B C D

(2) The applicant's application for the declaratory order was not purely academic and it did not cause any delay to the defendant's sixth AGM. There was no adequate remedy available to the applicant if the declaratory relief sought for was not granted. The applicant was denied the exercise of its statutory right to vote at the AGM granted under the SMA by the defendant. Accordingly, it was neither inequitable nor was it contrary to acceptable principles upon which the courts exercised its discretion for the court to grant the declaration prayed for by the applicant (see paras 58–60). E F

(3) The applicant had every right to seek for a declaratory order from the court as prayed for in the OS. Nothing in the SMA stipulated that the applicant must file its claim with the tribunal before filing any application in court (see paras 63 & 65).

(4) On the plain and ordinary reading of para 14 of the Second Schedule of the SMA, it meant that the defendant should put up the names of the eligible voters no later than 48 hours prior to the AGM. It did not mean that the defendant could not put up the list of eligible voters before the 48 hours. The defendant refused to provide any confirmation to the applicant on whether or not it was entitled to vote at the AGM when asked by the applicant in writing. Hence, the OS was not filed prematurely. It would not be correct for the court to use its discretion to summarily strike out the applicant's OS (see paras 68 & 70–71). G H

(5) Accordingly, in respect to encl 9, the defendant's application to strike out the applicant's OS was dismissed. The AGM held on 6 May 2018 without the participation of the applicant was null and void, and of no effect. Costs of RM10,000 in respect of encls 1 and 9 to be paid by the defendant to the plaintiff subject to the allocator fee (see paras 72–73 & 75). I

[Bahasa Malaysia summary

Pemohon memohon dengan cara saman pemula ex parte ('OS') ('lampiran 1') dan defendan memohon untuk membatalkan OS pemohon ('lampiran 9'). Pemohon memohon untuk, antara lain, suatu perintah bahawa mana-mana mesyuarat agung tahunan ('AGM') yang diadakan tanpa penyertaan pemohon adalah batal dan tidak sah, tanpa kesan, dan/atau diketepikan. Pemohon adalah pemilik berdaftar tujuh parcel runcit di bangunan yang dikenali sebagai Plaza 393 Complex ('Plaza 393'). Defendan adalah perbadanan pengurusan ('MC') Plaza 393 di bawah Akta Hakmilik Strata 1985. Defendan memulakan tindakan terhadap pemohon di Mahkamah Tinggi Kuala Lumpur pada 2016 atas tunggakan caj perkhidmatan, dana terikat, cukai pintu dan caj insurans untuk tempoh dari 21 April 2008–4 Mac 2016. Selepas perbicaraan penuh, Mahkamah Tinggi membenarkan tuntutan defendan dengan jumlah RM10,420,461.50 ('jumlah penghakiman') dengan faedah dan kos ('penghakiman 2016'). Pemohon merayu kepada Mahkamah Rayuan dan pada 21 Mac 2018, Mahkamah Rayuan membenarkan rayuan dan mengenepikan penghakiman 2016. Pada 10 April 2018, pemohon menerima akaun April 2018 bertarikh 5 April 2018 ('penyata April 2018') daripada defendan yang menunjukkan bahawa pemohon itu berhutang kepada defendan dengan jumlah RM11,930,047.15 ('caj April 2018'). Kenyataan April 2018 mengandungi caj dari 21 April 2008–4 Mac 2016, yang mana dituntut pemohon adalah tidak sah dan yang mana defendan tidak berhak untuk membuat caj memandangkan keputusan Mahkamah Rayuan. Pada 13 April 2018, pemohon diberitahu oleh Dewan Bandaraya Kuala Lumpur bahawa defendan merancang untuk mengadakan AGM pada 6 Mei 2018. Pada 17 April 2018, pemohon mengarahkan peguamnya untuk mempertikaikan caj April 2018 dan menuntut agar defendan memberikan pengesahan bertulis bahawa pemohon berhak untuk mengundi di AGM. Peguam defendan dalam jawapan bertarikh 20 April 2018 kepada peguam pemohon enggan memberikan pengesahan bertulis yang diminta dan menyatakan bahawa di bawah perenggan 14 Jadual Kedua Akta Pengurusan Strata 2013 ('SMA'), defendan hanya diwajibkan meletakkan nama orang yang berhak untuk mengundi di AGM di papan notis sekurang-kurangnya 48 jam sebelum AGM. AGM ke-enam telah diadakan dan pemohon tidak dibenarkan mengundi di AGM.

Diputuskan:

(1) Oleh kerana caj penyelenggaraan tidak dikenakan dengan cara yang dimandatkan oleh s 60(3) SMA, tiada caj yang dikenakan menurut s 60(3) SMA berkenaan dengan parcel pemohon. Diikuti bahawa sumbangan kepada dana terikat juga tidak menurut s 61(3). Tiada asas bagi defendan untuk memasukkan jumlah penghakiman dalam penyata April 2018 dan, berdasarkan ini, untuk menunjukkan dalam kenyataan bahawa pemohon mempunyai caj tertunggak, yang dihutang dan perlu

dibayar kepada defendan. Defendan tidak boleh memasukkan caj, yang tidak dimandatkan oleh undang-undang dan yang mana Mahkamah Rayuan telah putuskan tidak sah, dalam pernyataan April 2018 (lihat perenggan 49–50 & 52).

(2) Permohonan pemohon untuk perintah pengisytiharan itu bukan semata-mata akademik dan tidak menyebabkan kelewatan kepada AGM ke-enam defendan. Tiada remedi yang mencukupi untuk pemohon jika relief pengisytiharan yang dipohon itu tidak diberikan. Pemohon telah dinafikan pelaksanaan hak berkanun untuk mengundi di AGM yang diberikan di bawah SMA oleh defendan. Oleh itu, ianya adalah tidak adil atau bertentangan dengan prinsip yang boleh diterima di mana mahkamah menggunakan budi bicaranya untuk memberi pengisytiharan yang dipohon oleh pemohon (lihat perenggan 58–60).

(3) Pemohon mempunyai hak untuk memohon perintah pengisytiharan dari mahkamah seperti yang dipohon di dalam OS. Tiada apa-apa pun di dalam SMA yang menyatakan bahawa pemohon mesti memfailkan tuntutannya dengan tribunal sebelum memfailkan permohonan di mahkamah (lihat perenggan 63 & 65).

(4) Pada pembacaan biasa dan semulajadi dalam perenggan 14 Jadual Kedua SMA, ia bermaksud bahawa defendan harus meletakkan nama pengundi yang layak tidak lewat dari 48 jam sebelum AGM. Ini tidak bermakna bahawa defendan tidak boleh meletakkan senarai pengundi yang layak sebelum 48 jam. Defendan enggan memberikan apa-apa pengesahan kepada pemohon sama ada atau tidak ia berhak untuk mengundi pada AGM apabila ditanya oleh pemohon secara bertulis. Oleh itu, OS tidak difailkan secara pramatang. Ia tidak betul bagi mahkamah untuk menggunakan budi bicara untuk membatalkan OS pemohon (lihat perenggan 68 & 70–71).

(5) Oleh itu, berkenaan dengan lampiran 9, permohonan defendan untuk membatalkan OS pemohon telah ditolak. AGM yang diadakan pada 6 Mei 2018 tanpa penyertaan pemohon adalah batal dan tidak sah, dan tiada kesan. Kos RM10,000 berhubung dengan lampiran 1 dan 9 akan dibayar oleh defendan kepada plaintif tertakluk kepada yuran allocator (lihat perenggan 72–73 & 75).]

Notes

For cases on management corporation, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5667–5694.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 2 AMR 1969; [1993] 4 CLJ 7, SC (refd)

CC Ng & Brothers Sdn Bhd v Government of State of Pahang [1985] 1 MLJ 347;

A [1985] 1 CLJ 235; [1985] CLJ Rep 45, FC (refd)
Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp (established under The Strata Titles Act 1985) [2018] 4 MLJ 284; [2018] 1 LNS 259; [2018] AMEJ 0250, CA (refd)
Perbadanan Pengurusan Endah Parade v Magnificient Diagraph Sdn Bhd [2013] 6 MLJ 343; [2014] 5 CLJ 881; [2013] 1 LNS 1368, CA (refd)
B *Plaza 393 Management Corporation (established under the Strata Titles Act 1985) v Ekuiti Setegap Sdn Bhd* [2016] MLJU 1177; [2016] 1 LNS 1398; [2017] 2 AMR 849, HC (refd)
Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (Executor of the Estate of Loo Cheng Ghee) [1998] 4 MLJ 651; [1998] 4 CLJ 812; [1999] 2 AMR 1235, C CA (refd)
Zulkiflee bin Abdul Samad & Ors v Segi Objektif (M) Sdn Bhd [2016] MLJU 1333; [2016] 1 LNS 1488; [2017] 2 AMR 811, CA (refd)

D **Legislation referred to**

Building and Common Property (Maintenance and Management) Act 2007 (repealed by the Strata Management Act 2013)
Rules of Court 2012 O 18 r 19(1), O 18 r 19(1)(a), (1)(b), (1)(d)
E Strata Management Act 2013 ss 2, 3, 50(1), 51(1), 52(1), (2), (3), 55(1), 59(2), 60(1), (3), (4), (4A), 61(1), (3), 73, 78, 106, Chapter 5, Part V, Second Schedule, paras 7(6), 14, 21, 21(2)
Strata Titles Act 1985 ss 36, 43(2), 45(3)

F *Kamaraj Nayagam (Kent Chai Wai Hong with him) (Mah-Kamariyah & Philip Koh) for the plaintiff.*
Aimee SH Liew (Au Yong Wai Nyan and Chin Weng Yaa with her) (YH Teh & Quek) for the defendant.

G **Faizah Jamaludin JC:**

[1] This is my grounds of judgment in respect of the applicant's application by way of an ex parte originating summons ('OS') (encl 1) and the defendant's application (encl 9) to strike out the applicant's OS.

H

[2] In the OS, the applicant prayed for the following reliefs:

(a) a declaration that the applicant is entitled to attend and vote at the annual general meeting of the defendant which is scheduled to be held on 6 May I 2018 ('AGM');

(b) an order that the duly elected Chairman of the AGM shall not prevent the applicant from casting its votes and shall accept the votes of the applicant in any motion or resolution proposed in the AGM;

(c) in the event that the originating summons cannot be heard before 6 May 2018, an order that any AGM held without the participation of the applicant shall be null and void, of no effect, and/or set aside;

(d) costs of this application to be paid by the defendant to the applicant;

(e) the applicant be given liberty to apply to carry out and effect the order of this court; and

(f) such further and other relief as this court deems fit.

[3] The defendant objected to the hearing of the ex parte OS on an opposed basis. It requested that the OS be heard inter partes and that it be allowed to file an affidavit in reply, which requests were allowed by this court. Therefore, prayers (1) and (2) of the OS could not be determined by this court as the OS was heard after the AGM on 6 May 2018.

[4] After reading the affidavits and hearing the submissions of counsels, in respect of encl 1, this court allowed prayer (3) and declared that the AGM held on 6 May 2018 without the participation of the applicant is null and void, and of no effect. This court found that it was wrong and contrary to the provisions of the Strata Management Act 2013 for the defendant to have prevented the applicant from attending and voting at the AGM held on 6 May 2018.

[5] The defendant's application in encl 9 was dismissed with costs.

[6] The reasons for my decision in respect of encls 1 and 9 are as set-out herein.

THE FACTS

[7] The applicant is the registered owner of seven retail parcels measuring 439,525.64 sqft in the building known as Plaza 393 Complex ('Plaza 393'). The defendant is the management corporation ('MC') of Plaza 393 established on 21 April 2008 under the Strata Titles Act 1985 ('the STA').

[8] The defendant commenced an action against the applicant at the Kuala Lumpur High Court in 2016 (Civil Suit No WA-22NCVC-160–03 of 2016) for arrears of service charges, sinking fund, quit rent and insurance charges for the period from 21 April 2008–4 March 2016. After full trial, the High Court allowed the defendant's claim in the sum of RM10,420,461.50 ('judgment sum') with interests and costs ('the 2016 judgment'): see *Plaza 393 Management Corporation (established under the Strata Titles Act 1985) v Ekuiti Setegap Sdn Bhd* [2016] MLJU 1177; [2016] 1 LNS 1398; [2017] 2 AMR 849. The applicant appealed to the Court of Appeal and applied for a stay of

A the 2016 judgment pending the disposal of the appeal. On 8 February 2017, the High Court allowed the stay application with the condition that the applicant deposit the judgment sum with the defendant's solicitors as stakeholders within seven weeks from the date of the stay order, failing which the defendant is entitled to proceed with the execution of the 2016 judgment
B ('stay order'). On 10 March 2017, the applicant paid the judgment sum to the defendant's solicitors as stakeholders pursuant to the stay order.

[9] On 21 March 2018, the Court of Appeal allowed the applicant's appeal
C and set aside the 2016 judgment: see *Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp (established under The Strata Titles Act 1985)* [2018] 4 MLJ 284; [2018] 1 LNS 259; [2018] AMEJ 0250. The Court of Appeal held, inter alia, that contributions to the management fund should have been determined on a share unit basis and the defendant had acted contrary to the STA in levying
D the services charges on a square feet basis. In view of the Court of Appeal's decision, the defendant's solicitors returned the judgment sum to the applicant's solicitors on 2 April 2018.

[10] On 10 April 2018, the applicant received the April 2018 accounts dated
E 5 April 2018 ('April 2018 statement') from the defendant showing that the applicant is indebted to the defendant in the sum of RM11,930,047.15 ('April 2018 charges'). The April 2018 statement contained the charges from 21 April 2008–4 March 2016, which the applicant claims is illegal and which the defendant is not entitled to charge in view of the Court of Appeal's decision.
F The applicant disputed the April 2018 charges and demanded that the defendant regularise the April 2018 statement.

[11] On 13 April 2018, the applicant was notified by the Dewan Bandaraya
G Kuala Lumpur ('DBKL') that the defendant plans to hold an AGM on 6 May 2018. On 17 April 2018, the applicant instructed its solicitors to dispute the April 2018 charges and demand that the defendant provide written confirmation that the applicant is entitled to vote at the AGM. The defendant's solicitors in its reply dated 20 April 2018 to the applicant's solicitors refused to
H provide the written confirmation requested and stated that under para 14 of the Second Schedule of the Strata Management Act 2013, the defendant is only obliged to put up the names of persons entitled to vote at an AGM on the notice board at least 48 hours prior to the AGM.

I **[12]** The defendant' sixth AGM was held on 6 May 2018. The applicant was not allowed to vote at the AGM. The chairman's motion was tabled and passed at the AGM without the participation of the applicant. The effect of the chairman's motion was to increase the applicant's service charges from RM38,280 to RM87,000 per month.

THE COURT OF APPEAL'S DECISION

[13] The defendant had levied contributions on the applicant on a square foot basis, whereas s 45(3) of the STA stipulates that the contributions be levied on a share unit basis.

[14] The Court of Appeal found that the contributions levied by the defendant on a square foot basis was illegal as it was contrary to the STA. It held that the defendant would be at liberty to claim the arrears due from the applicant at whatever rate determined by the general meeting on a share unit basis. The relevant paragraphs of the Court of Appeal's decision is reproduced below.

> [77] This court in *Endah Parade* held that a management corporation can only levy payments which are mandated by the statute and that it will be ultra vires its powers for the management corporation to levy payments which are not sanctioned by the statute. Similarly, in the instant case, *we find that the STA mandated that contributions to the management fund be determined on a share unit basis. Any other basis to determine the quantum of contribution would be contrary to the STA and thus illegal.* The fact that the charges levied on the square foot basis are in accordance with the resolutions passed at the plaintiff's general meeting is immaterial, given that the plaintiff cannot act beyond the provisions of the STA.
>
> [78] We are therefore constrained to rule in favour of the defendant on the second main issue. And on this ground, the appeal has to be and is hereby allowed with costs. We do not think that the plaintiff would in any event be prejudiced by our finding on illegality. As we had earlier found that the plaintiff's claim is not barred by limitation for the reason that the maintenance charges are on a running account, *the plaintiff would be at liberty to claim the arrears due from the defendant, at whatever rate determined by the general meeting, on a share unit basis.* (Emphasis added.)

[15] The defendant's application for leave to the Federal Court to appeal the Court of Appeal's decision was dismissed by the Federal Court.

THE APPLICANT'S CASE

[16] The applicant's position is that the Court of Appeal had held that the charges levied on a square foot basis by the defendant is illegal. Therefore, the 2018 April statement containing the illegal charges were clearly wrong and against the Court of Appeal's decision. The applicant's case is that although the Court of Appeal held that the defendant is entitled to claim the arrears in charges, the charges can only be claimed after the rate of charges on a share unit basis have been determined at a general meeting. In addition, that there are no outstanding charges due and payable by the applicant to the defendant because it had continuously made payment of the monthly service charges pending the disposal of the appeal.

[17] The applicant submits that s 60(4) of the SMA provides that any charges imposed by a management corporation shall be due and payable on the passing of a resolution to that effect at a general meeting and may be recovered in the manner set out in s 78 of the SMA from the proprietor. At the time filing of encl 1, the charges have not been determined on a share unit basis at a general meeting.

[18] Therefore, it is the applicant's case that unless a resolution has been passed at a general meeting determining the charges on a share unit basis and the applicant failed to pay the service charges on a share unit basis, the applicant cannot be excluded from voting at the AGM.

[19] The applicant submits that even if the applicant is in arrears of the charges, the said arrears cannot be 'due and payable' as the amount of arrears have not yet been calculated and determined.

[20] The applicant argues that if the defendant's allegation on the purported arrears of charges were allowed to stand despite the rate of charges on a share unit basis has not been approved at the general meeting, it would mean that all the proprietors in Plaza 393 would be in arrears and should not have been allowed to vote at the AGM. However, the defendant allowed other proprietors to vote and disallowed the applicant to vote at the AGM.

[21] It is the applicant's case that the defendant has acted mala fide because of the following:

(a) the defendant refused and/or failed to:

(i) regularise the April 2018 statement despite being requested to do so by the applicant;

(ii) provide confirmation in writing that the applicant is entitled to vote at the AGM;

(iii) allow the applicant to inspect the defendant's books of account despite that the right to inspect books of account is guaranteed under para 7(6) of the Second Schedule of the SMA;

(iv) issue a certificate to the applicant pursuant to s 73 of the SMA certifying the sum standing to the credit of the maintenance account and sinking fund account and the sum in the account that has been committed or reserved for expenses already incurred by the defendant;

(b) the defendant's audited account for the financial year ended June 2017 was not been tabled at the sixth AGM; and

(c) the applicant owns 29000 share units or about 29.58% of the total share units in the building and is the main commercial proprietor in Plaza 393. The applicant submits that if the applicant was allowed to vote at the AGM by poll, the applicant would have outvoted the chairman's motion since the eligible voters only own 28,686 share units. The applicant says that this was the obvious reason why the applicant was precluded by the defendant from voting at the AGM.

THE DEFENDANT'S CASE

[22] The defendant's case is that the Court of Appeal had stipulated in its grounds of judgment that the applicant remains in arrears. It submits that:

> 24. (d) the only issue left to be determined is the amount of arrears that the Applicant owes the defendant, which would be decided at the general meeting of the defendant; and
>
> (e) the new amount of arrears would only be reflected after the defendant management corporation had passed a resolution to vary the contribution to the management fund and/or Charges on a 'share unit' basis.
>
> 25. Regardless of what amount is to be levied and whether it is levied on a 'per square foot' or 'per share unit' basis, it is submitted that the Applicant clearly remained in arrears, as the Court of Appeal had confirmed.

[23] It argues that the applicant's request for a confirmation in writing that it was entitled to attend and vote at the sixth AGM was contrary to para 14 of the Second Schedule of the SMA.

[24] The defendant submits that the applicant's application is without any basis and misplaced in law for the following reasons:

(a) no voting rights were denied at the sixth AGM because the applicant remained in arrears of all the management fund and/or charges, as well as sinking fund, quit rent and insurance charges;

(b) the declaratory relief, if granted, would in effect make the sixth AGM null and void, which means that it will set aside all resolutions validly passed;

(c) the applicant did not come to court with clean hands because it remains in arrears of the contributions to the management fund and/or charges due and payable to the defendant;

(d) the applicant's ex parte originating summons was filed prematurely on 24 April 2018 since the cause of action had not yet accrued as the list of eligible voters was only put up on 4 May 2018; and

A (e) the applicant had failed to exhaust the internal remedy provided in the SMA before coming to court.

[25] The crux of the defendant's case is that the applicant remains in arrears of all the maintenance charges due and payable from 21 April 2008–4 March 2016 and being in arrears, it is not entitled to vote at the AGM in accordance with para 21(2) of the Second Schedule of the SMA.

[26] The defendant argues that even if the applicant was deprived of its voting rights, it does not invalidate the sixth AGM because the AGM was properly and validly conducted.

ENCLOSURE 1: THE LAW ON STRATA TITLES AND ANALYSIS

[27] Plaza 393, which is the subject building of this present case, is located in the Federal Territory of Kuala Lumpur.

[28] The Strata Titles (Amendment) Act 2013 ('the STAA 2013') and the Strata Management Act ('SMA') came into force in the Federal Territory of Kuala Lumpur on 1 June 2015. The STAA 2013 carved out all the provisions relating the management of subdivided buildings under the STA and placed it under the SMA. The SMA is to be read and construed with the STA. Section 3 of the SMA states:

> 3 Construction of the Act
>
> This Act shall be read and construed with Strata Titles Act 1985 and the subsidiary legislation made under that Act in so far as they are not inconsistent with the provisions of this Act or the regulations made under this Act.

[29] The SMA repealed the Building and Common Property (Maintenance and Management) Act 2007 ('the BCPA'). Chapter 5 of the SMA contains transitional and saving provisions due to the repeal of the BCPA.

[30] Part V of the SMA applies to a development area, where before or after the commencement of the SMA:

(a) vacant possession of a parcel in a building has been delivered by the developer to a purchaser; and

(b) the MC for the building has come into operation under the provisions of the STA.

[31] In this instant case, vacant possession of parcels in Plaza 393 had been given by the developer to the parcel owners and the defendant was established as the MC of Plaza 393 on 21 April 2008. Accordingly, Part V of the SMA applies to Plaza 393.

MAINTENANCE ACCOUNT AND SINKING FUND ACCOUNT

[32] The developer of Plaza 393 is obliged under s 50(1) of the SMA to open and maintain a maintenance account and under s 51(1) to open and maintain a sinking fund account in the name of the MC in which the charges and the contributions to the sinking fund collected from the proprietors of any parcel are deposited. 'Charges' is defined under s 2 of the SMA as 'any money collected to be deposited into the maintenance account'.

[33] Section 60(1) of the SMA states that the MC is to open a maintenance account in its name, if the maintenance account had not been established earlier by the developer in accordance with s 50(1). Similarly, pursuant to s 61(1), the MC is to open a sinking fund account in its name if the developer had not open the account under s 51(1).

[34] Pursuant to s 52(1) of the SMA, each proprietor is obliged to pay the charges and the contributions to the sinking fund to the MC for maintenance and management of Plaza 393 and the common property of the building. The developer is obliged under s 55(1) of the SMA to transfer the control of all balances of moneys in the maintenance account and sinking fund account to the MC no later than the expiry of the preliminary management period. 'Preliminary management period' means:

> the period commencing from the date of delivery of vacant possession of a parcel to a purchaser by the developer until one month after the first annual general meeting of the management corporation': s 46(2) of the SMA.

[35] Section 52(2) of the SMA stipulates that during the preliminary management period, the amount of charges to be paid shall be determined by the developer in proportion to the share units assigned to each parcel and s 52(3) stipulates that the amount of contribution to the sinking fund shall be a sum equal to ten per cent of the charges.

[36] The developer is under a duty to convene the first annual general meeting of the MC within on month after the expiration of the initial period. 'Initial period', in relation to an MC, means:

> the period commencing on the day on which the management corporation comes into existence and ending on the day on which there are proprietors, excluding the original proprietor of the lot of land or the developer who is registered as the

proprietor of a parcel or parcels or a provisional block or blocks, the sum of whose share units is at least one-quarter of the aggregate share units 46(2) of the SMA.

[37] Section 43(2) of the STA states that the powers of the MC includes, among others:

(e) to collect during the initial period by way of contributions from proprietors in proportion to the share units or provisional share units of their respective parcels or provisional blocks;

[38] Section 43(2) of the STA was deleted by STAA 2013 and is replaced by s 59(2) of the SMA, which states that the powers of the MC shall be, among others:

(a) to collect the Charges from the proprietors *in proportion to the share units or provisional share units* of their respective parcels or provisional blocks;

(b) to collect the contribution to the sinking fund from the proprietors of an amount equivalent to ten percent of the Charges; (Emphasis added.)

MAINTENANCE CHARGES MUST BE IMPOSED BASED ON SHARE UNITS

[39] Section 60(3) of the SMA stipulates that for the purpose of establishing and maintaining the maintenance account, the MC may at a general meeting:

(b) raise the amounts so determined *by imposing Charges on the proprietors in proportion to the share units* or provisional share units *of their respective parcels* or provisional blocks, and the management corporation may determine different rates of Charges to be paid in respect of parcels which are used for significantly different purposes and in respect of the provisional blocks; (Emphasis added.)

[40] Section 61(3) states that the amount of contribution to the sinking fund to be paid by the proprietors shall be 10% of the charges imposed under s 60(3) unless otherwise determined from time to time at a general meeting of the MC but the amount shall not be less than 10% of the charges.

[41] In this present case, the defendant as the MC of Plaza 393 had imposed and collected charges based on the square footage of the proprietors' respective parcels and not in proportion to the share units of their respective parcels as stipulated in the SMA. The Court of Appeal held that the determination of the amount of contribution which is not based on the share units is illegal of the STA. The charging of the charges based on square footage as opposed to on share units is also illegal of the SMA.

[42] The Court of Appeal in para 70 of its grounds of judgment referred to

the s 36 of the STA prior to the amendment of the section by the STAA 2013. Section 36 of the STA as amended by the STAA 2013 reads as follows:

> The value of each parcel, except in the case of an accessory parcel where no share value shall be allotted, shown in the schedule of share units shall be taken as the share unit entitlement, and in the case of a provisional block the value shall be taken as the provisional share unit entitlement. *The share units of a parcel or the provisional share units in the case of a provisional block as specified in the strata title or in the provisional strata title, as the case may be, shall determine —*
>
> (a) *the voting rights of the proprietors; and*
>
> (b) *the proportion payable by each proprietor of the contribution levied by the management corporation according to the Strata Management Act 2013.* (Emphasis added.)

[43] Therefore, under the STA each proprietors' voting rights and their proportion payable of the contribution levied by the MC is determinant on their share units.

[44] Section 60(4A) of the SMA states that:

> (4) *Any Charges imposed under subsection (3) in respect of a parcel shall be due and payable on the passing of a resolution to that effect by the management corporation and in accordance with the terms of that resolution,* and *may be recovered in the manner set out in section 78 from the proprietor* of, or his successor-in-title to, the parcel, or the person for the time being receiving the rent of the parcel, whether as an agent or a trustee or a receiver, and who would receive the same if the parcel were let to a tenant. (Emphasis added.)

[45] The SMA has retrospective effect and is to be construed with the STA and the subsidiary legislation made under the STA in so far as they are not inconsistent with the provisions of the SMA or the regulations made under the SMA.

[46] Both the STA and the SMA expressly state that the charges are to be imposed on the proprietors in proportion to the share units of their respective parcels. The Court of Appeal held that the maintenance charges imposed on the proprietors based on the square footage of their respective parcels is illegal and ultra vires the STA.

[47] The defendant's power to impose the maintenance charges and contributions to the sinking fund is conferred by statute: namely the STA and the SMA. The MC's power to impose maintenance charges on proprietors of parcels in the building in proportion to the share units of their respective parcels is conferred by the STA and s 60(3) of the SMA. The MC does not have any power to impose the charges based on the square footage of the proprietors'

respective parcels. The Court of Appeal held that:

> [68] ... In our view, it cannot be that the STA intended MC to charge parcel owners on a different basis, but rather *the law intended that there be only one basis for the quantum of contribution to the MC to be determined and that is on the basis of share unit*.
>
> [72] It is clear, particularly by reference to s 36(c) of the STA, that *there is an express statutory provision on how the maintenance charges should be calculated. It is the share unit that should form the basis of the proportion payable by the defendant of the maintenance charges. The levy based on the area or square foot is not provided for under the STA*. (Emphasis added.)

[48] The Court of Appeal held that an MC can only levy payments as mandated by statute. The Court of Appeal referred to the earlier decision of the Court of Appeal in *Perbadanan Pengurusan Endah Parade v Magnificient Diagraph Sdn Bhd* [2013] 6 MLJ 343; [2014] 5 CLJ 881; [2013] 1 LNS 1368, where the court held that:

> In this respect, we agree with the proposition advanced by the respondent that *the management corporation as a body incorporated under statute can only levy payments which are mandated by the statute*. It will be ultra vires its powers for the management corporation to levy payments which are not sanctioned by the statute.

FINDING

[49] The maintenance charges imposed by the defendant was held by the Court of Appeal to be illegal and ultra vires the STA. The charges were also not raised in accordance with s 60(3) of the SMA. As the charges were not imposed in a manner that is mandated by s 60(3) of the SMA, I find that there were no charges imposed pursuant to s 60(3) of the SMA in respect of the applicant's parcels.

[50] Section 61(3) states that the amount of contribution to the sinking fund to be paid by the proprietors shall be ten per cent of the charges imposed under s 60(3). As the charges imposed were not in accordance with s 60(3), it follows that the contributions to the sinking fund was also not in accordance with s 61(3).

[51] I disagree with the defendant's argument that the Court of Appeal confirms that the applicant was in arrears of charges which are due and payable. It is very clear from the Court of Appeal's grounds of judgment that it held that the charges imposed by the defendant was illegal and ultra vires the STA.

[52] For this reason, I find that there was no basis for the defendant to include the judgment sum in the April 2018 Statement and, based on this, to

show in the statement that the applicant has outstanding charges, which are due and payable to the defendant. The defendant cannot include charges, which are not mandated by statute and which the Court of Appeal had held to be illegal, in the April 2018 statement.

The applicant's voting right

[53] Paragraph 21 of the Second Schedule of the SMA provides that:

> 21 Voting rights of proprietor
>
> (1) Each proprietor who is not a co-proprietor shall have one vote in respect of each parcel on a show of hands, and on a poll, shall have such number of votes as that corresponding with the number of share units or provisional share units attached to his parcel or provisional block.
>
> (2) A proprietor shall not be entitled to vote if, on the seventh day before the date of the meeting, all or any part of the Charges, or contribution to the sinking fund, or any other money due and payable to the management corporation in respect of his parcel are in arrears.

[54] The wordings in para 21(2) is 'money due and payable'. The Court of Appeal had held that the charges imposed based on square foot was illegal. Therefore, as there was no legally imposed charges, accordingly, there would not be any 'money due and payable' from the applicant to the defendant on the seventh day prior to the AGM.

[55] Accordingly, as the applicant did not have any money due and payable to the defendant on the seventh day before the sixth AGM, the defendant was wrong and acted contrary to the provisions of the SMA in prohibiting the applicant from voting at the sixth AGM held on 6 May 2018.

Should the court use its discretion to the grant the declaratory relief sought by the applicant?

[56] The applicant is seeking for a declaratory order that the AGM held on 6 May 2018 without the participation of the applicant shall be null and void, of no effect, and/or set aside. In *Zulkiflee bin Abdul Samad & Ors v Segi Objektif (M) Sdn Bhd* [2016] MLJU 1333; [2016] 1 LNS 1488; [2017] 2 AMR 811, the Court of Appeal observed that:

> [9] In the instant case, the plaintiffs are seeking various declaratory reliefs. Declaratory relief is discretionary in nature. To succeed in declaratory reliefs, the plaintiffs must come with clean hands as well as there should not be delay or collateral purpose. The findings of the learned judge on these issues were detrimental to the plaintiffs and would deprive them of the prayers they sought. It is well established that (i) declaratory prayers are discretionary in nature and granted

A sparingly and judicially with regard to all the circumstances of the case and that a court will not make a declaratory judgment where the question raised is purely academic or to cause delay; (ii) to qualify for declaration, the plaintiff must not only show it is not inequitable for the court to grant but also that it is not contrary to the accepted principle upon which the court exercises its discretion; (iii) declaratory B prayers ought not be granted if all necessary and interested parties are not before the court (see *Low Kum Yoon v Teh Kim Huah* [1979] 1 MLJ 83; [1977] 1 LNS 67; *Tengku Jaffar bin Tengku Ahmad v Karpal Singh* [1993] 3 MLJ 156; [1993] 4 CLJ 183; *Sabu Development Sdn Bhd v Kelik Anak Bayel* [2007] 8 MLJ 264; [2007] 9 CLJ 475).

C

[57] In *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (Executor of the Estate of Loo Cheng Ghee)* [1998] 4 MLJ 651; [1998] 4 CLJ 812; [1999] 2 AMR 1235, Gopal Sri Ram JCA (as he then was) said:

D ... Thus, generally speaking, the court will not grant a declaratory judgment where an adequate alternative remedy is available (*Manggai v Government of Sarawak* [1970] 2 MLJ 41; [1970] 1 LNS 80) or upon hypothetical issues or upon an issue of no practical consequence (*Lim Kim Cheong v Lee Johnson* [1993] 1 SLR 313) or where it may be premature to grant a declaration (*Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136) or where a plaintiff is guilty of laches (*Faber* E *Merlin (M) Sdn Bhd & Ors v Lye Thai Sang & Anor* [1985] 2 MLJ 380; [1985] 1 LNS 44) or other inequitable conduct (*City of London v Hornes* [1914] 111 LT 512) or where a 'cloaked declaration', that is to say, a declaration for a collateral purpose (*Trawnik and another v Ministry of Defence* [1984] 2 All ER 791) or with an case improper motive, is sought (*Everett v Griffiths* [1924] 1 KB 941 at p 960). F We wish to make it plain that this list is by no means exhaustive. We merely seek and to demonstrate the wide variety of circumstances in which declaratory relief may be denied in the exercise of discretion.

FINDING

G

[58] In this present case, all the necessary and interested parties are before this court. The applicant's OS was heard inter-partes and both the applicant and defendant had filed their respective affidavits and submitted their H respective cases before this court. I find that the applicant's application for the declaratory order was not purely academic and it did not cause any delay to the defendant's sixth AGM. The AGM took place as scheduled on 6 May 2018.

[59] Further, I find that there is no adequate remedy available to the I applicant if the declaratory relief sought for is not granted. The applicant was denied the exercise of its statutory right to vote at the AGM granted under the SMA by the defendant.

[60] Accordingly, I find that it is neither inequitable nor is it contrary to acceptable principles upon which the courts exercises its discretion for this court to grant the declaration prayed for by the applicant.

ENCLOSURE 9: THE LAW ON STRIKING OUT AND ANALYSIS

[61] The defendant applied to strike out the applicant's originating summons under O 18 r 19(1)(a), and/or (1)(b) and/or (1)(d) under the Rules of Court 2012 ('the ROC'). The application was filed 25 days after the originating summons was served on the defendant's solicitors and 18 days after this court had given its direction in relation to the disposal of the originating summons. No explanation was given by the defendant for the delay.

[62] It is settled law that the power to strike out a case under O 18 r 19(1) of the ROC should be exercised sparingly and only in plain and obvious cases: see the Federal Court in *CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 347; [1985] 1 CLJ 235; [1985] CLJ Rep 45. The Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 2 AMR 1969; [1993] 4 CLJ 7, held that as long as the statement of claim discloses some cause of action or raises some questions fit to be tried, the mere fact that the case is weak or is unlikely to succeed is not relevant: the claim can only be struck out summarily if it is 'obviously sustainable': per Mohamed Dzaiddin SCJ.

Does the applicant have a reasonable cause of action?

[63] For the reasons discussed above, the applicant was wrongfully denied its statutory right to vote at the AGM by the defendant. Accordingly, the applicant has every right to seek for a declaratory order from this court as prayed for in the originating summons.

[64] The defendant submit that the applicant had failed to exhaust the internal remedy provided in the SMA, in that the applicant must first file its claim to the Strata Management Tribunal ('the tribunal'). However, s 106 of the SMA provides:

> (1) Where a claim is filed with the Tribunal and the claim is within the Tribunal's jurisdiction, the issues in dispute in that claim, whether as shown in the initial claim or as emerging in the course of the hearing, shall not be the subject of proceedings between the same parties in any court unless —
>
> (a) the proceedings before the court were commenced before the claim was filed with the Tribunal; or
>
> (b) the claim before the Tribunal is withdrawn, abandoned or struck out.

[65] The applicant's originating summons was filed in the court before any claim was filed in the tribunal. Accordingly, this court has the jurisdiction to hear this application. Nothing in the SMA stipulates that the applicant must file its claim with the tribunal before filing any application in court.

Was the OS filed prematurely?

[66] The defendant argues that the OS was filed prematurely as the cause of action had not yet accrued at the time of the filing of the OS since the defendant was only required by the SMA to post up a list of eligible voter 48 hours before the AGM. The defendant says that the applicant's rights, if any would only accrue at that stage.

[67] Paragraph 14 of the Second Schedule of the SMA provides:

> 14 List of names of persons entitled to vote
>
> The management committee of the management corporation shall put up a list of the names of the persons who are entitled to vote at a general meeting on the notice board *at least* forty-eight hours before the general meeting. (Emphasis added.)

[68] On the plain and ordinary reading of the para 14, it means that the defendant should put up the names of the eligible voters no later than 48 hours prior to the AGM. It does not mean that the defendant cannot put up the list of eligible voters before the 48 hours. The defendant refused to provide any confirmation to the applicant on whether or not it was entitled to vote at the AGM when asked by the applicant in writing.

[69] The defendant refused and/or failed to allow the applicant to inspect the defendant's book of account in breach of para 7(6) of the SMA, which provides as follows:

> (6) The management committee shall —
>
> (a) cause to be prepared such accounts and records of accounts as will sufficiently explain the transactions of the accounts and enable true and fair balance sheet, income and expenditure statement and profit and loss statement to be prepared; and
>
> (b) *on the application of a proprietor* or chargee *of a parcel* or a proprietor of a provisional block (or any person authorized in writing by him), *make the books of accounts available for inspection during office hours of the management corporation*, at a fee not exceeding fifty ringgit for each inspection. (Emphasis added.)

[70] The applicant's right to vote at the AGM is a right conferred by statute. Accordingly, the applicant is entitled to seek declaratory reliefs from this court

to protect its rights to vote at the forthcoming AGM. For these reasons, I do not find that the OS was filed prematurely.

[71] Furthermore, even if the OS was filed prematurely, I find that the applicant's claim was not plainly and obviously unsustainable. The right to vote at the AGM is a fundamental statutory right given by the SMA to the proprietors of the units of Plaza 393, of which the applicant is one. For these reasons, I am not persuaded that the applicant does not have a reasonable cause of action; that the claim is scandalous, frivolous or vexatious; and/or that the claim is an abuse of the process of the court. In my view, in the circumstances, based on the applicable law, it would not be correct for this court to use its discretion to summarily strike out the applicant's originating summons.

DECISION

[72] Accordingly, in respect to encl 9, the defendant's application to strike out the applicant's originating summons is dismissed.

[73] In respect of encl 1, for the reasons above, this court hereby declares that the AGM held on 6 May 2018 without the participation of the applicant is null and void, and of no effect.

[74] It is hereby ordered that:

(a) the AGM of the defendant be held within 60 days from the date hereof; and

(b) the applicant be entitled to attend the rescheduled AGM and to cast votes in respect of the 29,000 shares units that it holds provided that the applicant pays the sum of RM38,280 per month for the months of July, August, September and October 2018 of charges, contributions to the sinking fund and late payment interests for the months of July, August, September and October 2018 as invoiced, if any.

[75] Costs of RM10,000 in respect of encls 1 and 9 to be paid by the defendant to the plaintiff subject to the allocator fee.

ORDER

[76] So ordered accordingly.

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh